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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 728.

HUMBOLDT TOWNSHIP, IN THE COUNTY OF ALLEN, STATE OF KANSAS, PLAINTIFF IN ERROR,

vs.

NIMROD LONG, J. B. BRIGGS, AND M. B. MORTON, PARTNERS UNDER THE FIRM-NAME AND STYLE OF N. LONG & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 16, 1875.

Affirmed
Jno Strong

SUPREME COURT OF THE UNITED STATES.

No. 728.

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1 In the circuit court of the United States for the district of Kansas.

NIMROD LONG AND J. B. BRIGGS, M. B. MORTON, partners under the name-firm and style of N. Long & Co., plaintiffs,
vs.
HUMBOLDT TOWNSHIP, IN THE COUNTY OF Allen, State of Kansas.

Be it remembered that on the 11th day of May, 1874, *of* the said plaintiffs, by Clemens and Friedrich, their attorneys, filed in the clerk's office of said court their petition, precipe, and security for costs in said entitled cause; which said petition and amendments thereto, made by leave of court, with the endorsements thereon, are in words and figures following, to wit:

Petition.

In the circuit court of the United States in the district of Kansas.

NIMROD LONG AND J. B. BRIGGS, M. B. MORTON, partners under the name, firm, and style of N. Long & Co., plaintiffs,
vs.
2 HUMBOLDT TOWNSHIP, IN THE COUNTY of Allen, State of Kansas, defendant.
} Petition.

Said plaintiffs, partners in business under the firm-name and style of N. Long & Co., complain of said defendant for that said plaintiffs are citizens of the State of Kentucky, and that said defendant is a duly authorized and organized municipal corporation, composed of citizens of the State of Kansas; that on the day of , 18 , said defendant, being thereunto duly authorized, at Humboldt Township, in the county of Allen, in the State of Kansas, made it' several negotiable township bonds, and then and there issued the same for and put them in circulation, the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad and for the construction of the same through said township in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock to any railroad, and to provide for the payment of the same," approved February 25th, A. D. 1870, and said bonds were, before the maturing of the coupons herein often mentioned, duly registered in the office of the auditor of the State of Kansas according to law; that the said defendant, at the time
3 and place aforesaid, in connection with one of said bonds, and being thereunto duly authorized, made its coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "A," and thereby promised to the bearer of said coupon ($17.50) seventeen dollars and fifty cents, at the banking-house of Gilman & Son and Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

II. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of

which coupon is hereto attached, marked "B," and thereby promised to pay to the bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

III. And said plaintiff further complain for that the defendant, at the time and place aforesaid, in connection with one of said bonds,
4 and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in cirlation, a copy of which coupon is hereto attached, marked "C," and thereby promised to pay to bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of December, 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

IV. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "D," and thereby promised to pay to bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

V. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in
5 writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "E," and thereby promised to bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that the said paintiffs are now the lawful owners and bearers of said coupon.

VI. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "F," and thereby promised to pay to bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

VII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon
6 in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "G," and thereby promised to pay to bearer of said coupon seventeen dollars and fifty cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that the said plaintiffs are now the lawful owners and bearers of said coupon.

VIII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "H," and thereby promised to pay to bearer of said coupon seventeen dollars and fifty

cents, ($17.50,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dece., 1873, and that the said plaintiffs are now the lawful owners and bearers of said coupon.

IX. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon
7 in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "I," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

X. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "J," and thereby promised to pay to bearer of said coupon ($35.00) thirty-five dollars, at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XI. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in
8 writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "K," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "L," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XIII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "M," and there-
9 by promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XIV. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "N," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on

he 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XV. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "O," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XVI. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "P," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that the said plaintiffs are now the lawful owners and bearers of said coupon.

XVI. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "Q," and *and* thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman Son & Co., in the city of New York, on the 31st of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XVIII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "R," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XIX. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "S," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XX. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "T," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XXI. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in
13 circulation, a copy of which coupon is hereto attached, marked "U," and thereby promised to pay to the bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XXII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "V," and thereby promised to pay to the bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are the lawful owners and bearers of said coupon.

XXIII. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other
14 coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "W," and thereby promised to pay to bearer of said coupon ($35.00,) thirty-five dollars, at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that said plaintiffs are now the lawful owners and bearers of said coupon.

XXIV. And said plaintiffs further complain for that the said defendant, at the time and place aforesaid, in connection with one of said bonds, and being authorized as aforesaid, made its certain other coupon in writing, and then and there issued the same and put it in circulation, a copy of which coupon is hereto attached, marked "X," and thereby promised to pay to bearer of said coupon thirty-five dollars, ($35.00,) at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., 1873, and that the said plaintiffs are now the lawful owners and bearers of said coupon.

And said plaintiffs further aver that at the maturity of the said coupons they were all duly presented at the said banking-house of Gilman, Son & Co., in the city of New York, and payment thereof was then and there duly demanded, but no part thereof was then or ever has
15 been paid. Wherefore said plaintiffs pray judgment against said defendant for the sum of seven hundred dollars, ($700.00,) with interest thereon from the 3rd day of January, A. D. 1874.

Attorneys for plaintiffs, CLEMENS & FRIEDRICH.

Precipe.

The clerk will issue summons in this case, returnable in (10) ten days, for amount claimed, ($700.00,) seven hundred dollars, with interest thereon from the 3rd day of January, A. D. 1874.

Attorneys for plaintiffs, CLEMENS & FRIEDRICH.

(Endorsed:) No. 1045. N. Long & Co. vs. Humboldt Twp., Allen Co., Kans. Petition & precipe. Filed May 11, 1874. A. S. Thomas, clerk.

Security for costs.

In the circuit court of the United States for the district of Kansas.

N. LONG & Co.
vs.
HUMBOLDT TWP., ALLEN CO., KANSAS.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court. And in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 11th day of May, 1874.

CHAS. N. RIX.

16 (Endorsed:) No. 1045. N. Long & Co. vs. Humboldt Twp., Allen Co., Kans. Security for costs. Filed May 11, 1874. A. S. Thomas, clerk.

And on this day, to wit, May 12th, 1874, the clerk of said court issued a summons in said entitled cause; which summons, with the endorsements and marshal's return thereon, is in words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to the marshall of the district of Kansas, greeting:

You are hereby commanded to notify Humboldt Township, county of Allen, in the State of Kansas, that it has been sued by Nimrod Long, J. B. Briggs, and M. B. Morton, partners under the name-firm and style of N. Long & Co., in the circuit court of the United States for the district of Kansas, and that unless it answers by the 11th day of June, A. D. 1874, the petition of the said Nimrod Long, J. B. Briggs, and M. B. Morton, partners under the name-firm and style of N. Long & Co., against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 22d day of May, A. D. 1874.

17 Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 12th day of May, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:)
Suit brought for the recovery of money; amount claimed $700.00, with interest from the 3rd day of January, A. D. 1874, at the rate of per cent. per annum. Clemens & Fredrick, attorneys for plaintiffs. No. 1045. Circuit court of the United States for the district of Kansas. N. Long & Co. vs. Humboldt Township, in the county of Allen, in the State of Kansas. Summons issued May 12th, 1874; returnable May 22d, 1874. Clemens & Fredrick, attorneys for plaintiffs.

UNITED STATES OF AMERICA,
District of Kansas, ss:

Know all men by these presents that I hereby depute and appoint F. S. Stover my true and lawful deputy, with full power that I may myself possess, to execute the hereunto attached and annexed process, to wit, writ of summons issued out of circuit court of the United States for the district of Kansas, in case No. 1045, dated May 12, 1874, wherein N. Long & Co. is plaintiff and Humboldt Township, of Allen County, Kas., is defendant, and to make true return of the execution thereof, according to law.

Witness my hand this 19th day of May, A. D. 1874.

W. S. TOUGH,
18 *Marshal of the United States for the District of Kansas.*

U. S. marshal's return.

DISTRICT OF KANSAS, *ss:*

Rec'd the within May 12th, 1874, and executed the same at Allen County, State and district of Kansas, on the 20 day of May, 1874, by delivering to Geo. Moon, township clerk, and J. B. Yorend, trustee of Humboldt Township, each of them personally, a true and certified copy of this writ, with all the endorsements thereon.

W. S. TOUGH,
U. S. M. District of Kansas,
By T. S. STOVER,
Spec. Deputy.

Marshal's fees: For service of writ	4.00
" travel 130 miles, 6 c	7.80
	$11.80

Filed May 22d, A. D. 1874.

A. S. THOMAS, *Clerk.*

At a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday the first day of June, A. D. 1874, there were present Hon. Samuel F. Miller, John F. Dillon, and C. G. Foster, and the following proceedings, amongst others, were had and appear of record, in the words and figures following, to wit:

Journal entry.

SATURDAY, *June 6th, A. D.* 1874.

A. LONG & Co.
vs.
HUMBOLDT TOWNSHIP, IN THE COUNTY OF ALLEN and State of Kansas. } 1045.

19 Now comes the defendant herein, by J. B. T. Cates, its attorney, and, on its application, it is ordered by the court that it be, and is hereby, allowed forty days from this day in which to file an answer herein; and this case is continued to the next term hereof.

And on this day, to wit, July 14th, 1874, the said defendant filed in

the clerk's office of said court its answer in said entitled cause; which answer, with the endorsements thereon, is in words and figures following, to wit:

Answer.

In the circuit court of the United States, in the district of Kansas.

NIMROD LONG, J. B. BRIGGS, & M. B. HORTON, partners under the firm-name and style of N. Long & Co., plaintiffs,
vs.
HUMBOLDT TOWNSHIP, IN THE COUNTY OF Allen, in the State of Kansas, defendant.
} Answer.

And now comes the said defendant, and, for answer to the petition of the said plaintiffs, admit that said plaintiffs are citizens of the State of Kentucky, and that the defendant is a corporation, as alleged in plaintiffs' petition; and defendant neither admits nor denies that
20 plaintiffs are the owners of the coupons in said petition described, but, further answering, deny each and every allegation in said petition not hereinbefore specially admitted or referred to.

THURSTON & KESSLINGER,
CATIS & BASHED,
Attys. for Deft.

STATE OF KANSAS,
County of Allen, ss:

On this 11th day of July, A. D. 1874, personally appeared J. B. Young, who, being duly sworn, makes oath and says that he is the trustee of Humboldt Township, in the county of Allen, in the State of Kansas; that he has read the above and foregoing answer, and that the facts and allegations therein contained are true.

J. B. YOUNG.

Sworn to before me and subscribed in my presence this 11th day of July, A. D. 1874.

W. H. ANDREWS,
Justice of the Peace in and for Humboldt Township, Allen County, & State of Kansas.

L. W. Keplinger, being sworn, says he has read the foregoing answer to plaintiff's petition as this day amended; that he is atty. for the above deft.; that the matter' set forth in said answer are true.

L. W. KEPLINGER.

Subscribed and sworn to before me this 9th day of December, A. D. 1874.

A. S. THOMAS, *Clerk.*

(Endorsed:) In the United States circuit court, in the district of Kansas. No. 1045. N. Long & Co., plffs., vs. Humboldt Township,
21 Allen County, Kansas, deft. Answer. Filed July 14th, 1874. A. S. Thomas, clerk. Filed Dec. 9th, 1874. A. S. Thomas, clerk. Thurston & Keplinger, Cates & Barker, attys. for deft.

And on this day, to wit, November 23rd, 1874, the parties, by their attorneys, filed in the clerk's office of said court their stipulation to continue in said entitled cause; which stipulation to continue, with the endorsements thereon, is in words and figures following, to wit:

Stipulation to continue.

In the United States circuit court for the district of Kansas.

N. LONG & CO., PLFFS.,
vs.
THE TOWNSHIP OF HUMBOLDT, ALLEN COUNTY, Kansas, defts. } Stipulation.

It is hereby agreed by the attys. of record of the parties to the above-entitled suit that the same shall not be called for trial, or any further proceedings whatever, until Wednesday, Dec. 2d, 1874.

THURSTON & KEPLINGER AND
CATIS & BARKER,
Attys. for Deft.

Attys. for Plff., CLEMENS & FREDRICK,
Attys. for Pffs.

(Endorsed:) No. 1045. Long & Co. vs. The Township of Humboldt. Stipulation to continue. Filed Nov. 23, 1874. A. S. Thomas, clerk.

Stipulation waiving a jury.

22 And on this day, to wit, December 9th, 1874, the parties, by their attorneys, filed in the clerk's office of said court their stipulation waiving a jury in said entitled cause; which said stipulation waiving a jury, with the endorsements thereon, is in words and figures following, to wit:

N. LONG & CO.
vs.
HUMBOLDT TOWNSHIP, ALLEN COUNTY, KANSAS. } 1045.

We hereby waive a jury in this case, and submit it to the court for trial.

G. C. CLEMENS,
Atty. for Plffs.
THURSTON & KEPLINGER.

(Endorsed:). No. 1045. N. Long & Co. vs. Humboldt Tp., Allen Co., Kans. Stipulation waiving a jury. Filed Dec. 9th, 1874. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the 23rd day of November, 1874, there were present Hon. John F. Dillon and C. G. Foster, judges; and the following proceedings, amongst others, were had, and appear of record in the words and figures following, to wit:

Journal entry.

WEDNESDAY, *December 9th*, 1874.

23 N. LONG & Co.
vs.
HUMBOLDT TOWNSHIP, COUNTY OF ALLEN, State of Kansas. } 1045.

Now come the plaintiffs herein, by G. C. Clemens, their attorney, and the defendants by Thurston & Keplinger & N. Cobb, its attorneys; and thereupon the plaintiffs, by consent, amend their petition by interlineation, alleging therein the purpose for which the bonds mentioned in said petition were issued; and the defendant, by consent, reverifies its answer and refiles it as an answer to the petition as amended; and thereupon the parties announced themselves ready for trial, and, by written stipulation filed herein, waive a jury and submit this case to the court for trial.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 7th day of June, A. D. 1875, there were present Hon. Samuel F. Miller and C. G. Foster, judges, and the following proceedings, amongst others, were had, and appear of record, in the words and figures following, to wit:

N. LONG & Co.
vs.
HUMBOLDT TOWNSHIP, IN THE COUNTY
24 of Allen, State of Kansas. } 1045.

On motion of the plaintiffs, by G. C. Clemens, their attorney, it is ordered by the court that the plaintiffs have leave to amend their petition by alleging that the bonds to which the coupons sued on were annexed were duly registered by the auditor of the State of Kansas.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 7th day of June, A. D. 1875, there were present Hon. Samuel F. Miller and C. G. Foster, judges, and the following proceedings, amongst others, were had, and appear of record, in the words and figures following, to wit:

Judgment.

FRIDAY, *June 18th*, 1875.

NIMROD LONG, J. B. BRIGGS, AND M. B. Morton, partners under the name, firm and style of N. Long & Co., plffs.,
vs.
HUMBOLDT TOWNSHIP, IN THE COUNTY OF Allen, in the State of Kansas, defendant. } 1045.

And now come the said plaintiffs, by G. C. Clemens, their attorney, and the said defendant, by Thurston & Keplinger, its attorneys,

25 and the court having heard the evidence adduced and arguments of counsel, finds for the plaintiffs, and assesses their damages against the said defendant at the sum of seven hundred and seventy-one & $\frac{45}{100}$ dollars. It is therefore considered and adjudged by the court that the said plaintiffs have and recover of and from the said defendant the said sum of seven hundred and seventy-one & $\frac{45}{100}$ dollars, ($771.45,) and thereupon was filed a certificate of division, which is in the words & figures following, to wit:

Certificate of division of opinion.

In the circuit court of the United States, district of Kansas.

NIMROD LONG, J. BRIGGS, AND M. B. MORTON, partners as N. Long & Co., plaintiffs, *vs.* HUMBOLDT TOWNSHIP, ALLEN COUNTY, KANSAS, defendant. } Certificate of division of opinion.

Justice Miller & Judge Foster.

Be it remembered that on the 11th day of May, 1874, the plaintiffs in the above-entitled action filed their petition in said court praying judgment against said defendant for the sum of seven hundred dollars, with interest thereon from the third day of January, at the rate of seven per cent., which sum is alleged to be due on interest coupons attached

26 to certain bonds which it is in said petition alleged were issued by the defendant to the Fort Scott and Allen County Railroad Company, pursuant to the provisions of chapter (90) ninety of the laws of the State of Kansas, in the year 1870, which said bonds were duly registered by plaintiffs before the commencement of this action in auditor's office of said State; and afterward the defendant filed its answer to said petition, which answer consisted of a duly verified denial of the execution of said bonds & coupons by the defendant or by its authority; and afterwards, at the said June term of said court for the year 1875, Justice Miller presiding, judgment was rendered in said action (after trial upon the issues joined) in favor of the plaintiff, as prayed for in plaintiff's petition, and among other facts established by the evidence in said action were the following:

1st. That the bonds mentioned in plaintiff's petition were a part of an issue of bonds amounting in the aggregate to seventy-five thousand (75,000) dollars, and that said bonds and the coupons sued on were of the same tenor and effect as the copy of bond and coupon hereto attached and marked "A," & made a part thereof.

2nd. That the only vote authorizing the issuing of these bonds

27 was at a special election held in the defendant township on the fourth day of April, eighteen hundred and seventy-one, (1871.)

3rd. That the order of the board of county commissioners directing said election to be held was dated and made on the sixteenth (16) day of March, eighteen hundred and seventy-one, (1871.

4th. That from the latest assessment-rolls in existence at the date said vote was taken, to wit, the assessment-rolls for the year eighteen hundred and seventy, it appeared that the total value of all the taxable property within said defendant township amounted to four hundred and fifteen thousand dollars, and there was no other evidence introduced upon the trial of said cause tending to show the value of the taxable property in said township save and except said assessment rolls; and the judges were

divided in their opinions upon the following questions which arose upon the trial of said cause, and are presented by said facts, to wit: 1st. Are the bonds to which the coupons sued on were attached negotiable bonds, such as to entitle the plaintiff to the benefits of a bona-fide holder of negotiable paper taken in the ordinary course of business before maturity? 2nd. Are the bonds rendered invalid by reason of the election above mentioned, having been held within less than
28 thirty days after the date of the order calling therefor? 3rd. Were the assessment-rolls above mentioned the proper evidence from which the commissioners were to determine the value of the taxable property of the township, and are the bonds mentioned in plaintiff's petition invalid by reason of having been voted and issued in excess of the statutory limit as shown by said assessment-rolls?

Judge's certificate.

We do hereby certify that the above and foregoing is a true and correct statement of the proceedings in the above-entitled action of N. Long & Co. vs. Humboldt Township, and that the facts therein alleged to have been shown in evidence were established by the evidence introduced upon the trial of said cause, and that the above questions arose upon the trial of said cause, and were presented by the pleadings in said cause, and the evidence introduced upon the trial of the same; and we further certify that the judgment rendered in said action depends upon the determination of said questions; and we further certify that we, the judges, holding the term of court at which said judgment was rendered, were divided in opinion upon each and all of said questions.

SAM. F. MILLER,
Circuit Justice.
C. G. FOSTER,
District Judge.

EXHIBIT A.—(*Copy of bond and coupon.*)

29 Be it known that Humboldt Township, in the county of Allen and State of Kansas, is indebted to the Fort Scott & Allen County Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the 1 days of Jan., in each year, at the banking-house of Gilman, Son & Co., in the city of New York, on the presentation and surrender of the respective interest-coupons hereto annexed. The principal of this bond shall be due and payable on the 31 day of December, A. D. 1901, at the banking-house of Gilman, Son & Co., in the city of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment for the same," approved February 25, A. D. 1870; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith
30 of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged.

In testimony whereof this bond has been signed by the chairman of

the board of county commissioners of Allen County, Kansas, and attested by the county clerk of said county, this 12th day of October, 1871.

Z. WISNER,
Chairman County Commissioners.

Attest: W. E. WAGGONER,
County Clerk.

Copy of coupon.—Exhibit A.

Humboldt Township. $17.50

The treasurer of Humboldt Township, Allen Co., Kansas, will pay bearer the sum of seventeen & $\frac{50}{100}$ dollars, at the banking-house of Gilman, Son & Co., in the city of New York, on the 31st day of Dec., A. D. 1873.

Z. WISNER,
Chairman County Commissioners.

Attest: W. F. WAGGONER,
County Clerk.

And on this day, to wit, the 12th day of August, 1875, the defendants, by their attorneys, filed in the clerk's office of said court their appeal-bond in said entitled-cause; which said appeal-bond, with the endorsement thereon, is in words and figures following, to wit:

Appeal-bond.

In the Supreme Court of the United States.

Whereas at the regular July term of the circuit court of the United States for the district of Kansas, Nimrod Long, J. Briggs, and
31 M. B. Morton, partners as N. Long & Co., recovered a judgment against the township of Humboldt, in Allen County, Kansas, for the sum of seven hundred dollars; and whereas said Humboldt Township has prosecuted a writ of error to the Supreme Court of the United States to revise said judgment: Now, therefore, know all men by these presents that we, S. H. Stevens, J. B. Young, and B. H. Dayton, of Allen County, Kansas, are held and firmly bound unto said N. Long & Co., defendants, in the sum of two hundred and fifty dollars, to be paid to said N. Long & Co., their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 27th day ot July, 1875.

The condition of this bond is such, that said Humboldt Township, pltff. in error, shall prosecute its writ to effect; and if it fail to make its plea good *it* shall answer all costs which may be adjudged against it, then this obligation to be void; otherwise to be and remain in full force and effect.

S. H. STEVENS.
J. B. YOUNG.
B. H. DAYTON.

STATE OF KANSAS,
County of Allen, ss:

32 The above-named S. H. Stevens, J. B. Young, & B. H. Dayton, being first duly sworn, say they are residents of Allen County,

Kansas, and are worth more than two hundred and fifty dollars over and above all liability & exemptions.

S. H. STEVENS.
J. B. YOUNG.
B. H. DAYTON.

Sworn to before me & subscribed in my presence this 27th day of July, 1875.

E. A. BARBER,
U. S. Clerk.

(Endorsed:) No. 1045. N. Long & Co. vs. Humboldt Township. Bond. Filed Aug. 12, 1875. A. S. Thomas, clerk.

33 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the case of N. Long & Co. vs. Humboldt Township, in the county of Allen, State of Kansas, No. 1045 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 20th day of August, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court before you, between Nimrod Long, J. Briggs, and M. B. Morton, as plaintiffs, and the Township of Humboldt, Allen County, Kansas, as defendant, a manifest error hath happened, to the great damage of the said Humboldt Township, as by its complaint appears; we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the
35 second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

(Indorsed:) No. 1045. Nimrod Long & Co. vs. Humboldt Township. Writ of error. Filed June 18, 1875. A. S. Thomas, clerk.

36 *Citation.*

The United States of America to Nimrod Long, J. Briggs, and M. B. Morton, partne's as N. Long & Co.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the United States circuit court, in the district of Kansas, wherein Humboldt Township is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable C. G. Foster, United States district
37 judge and member of the circuit court, by which said judgment was rendered, this the 12th day of August, eighteen hundred and seventy-five.

C. G. FOSTER, *Judge.*

I, G. C. Clemens, attorney of record for the above-named N. Long, J. Briggs, & M. B. Morton, do hereby acknowledge service of the above citation on behalf of each and all of the above-named defendants in error, this the 12th day of August, 1875.

G. C. CLEMENS,
Attorney for N. Long & Co.

38 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify that S. H. Stevens, J. B. Young, and B. H. Dayton, sureties on the appeal-bond in the case of N. Long & Co. vs. Humboldt Township, in the county of Allen, State of Kansas, No. 1045 in said court, are known to me to be perfectly good and responsible for the sum of two hundred and fifty dollars named in said bond.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in the said district of Kansas, this 22d day of September, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsement on cover:) No. 728. Humboldt Township, in the county of Allen, State of Kansas, plaintiff in error, vs. Nimrod Long, J. B. Briggs, & M. B. Morton, partners under the firm-name and style of N. Long & Company. Kansas C. C. U. S. Filed 16th October, 1875.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

HUMBOLDT TOWNSHIP, IN THE COUNTY OF ALLEN, IN THE STATE OF KANSAS, PLAINTIFF.

vs.

NIMROD LONG, J. B. BRIGGS, AND M. B. MORTON, PARTNERS UNDER THE NAME, FIRM AND STYLE OF N. LONG & CO., DEFENDANTS.

Writ of Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

WILSON SHANNON, AND
CATES & KEPLINGER,
Att'ys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

HUMBOLDT TOWNSHIP, IN THE COUNTY OF ALLEN, IN THE STATE OF KANSAS, PLAINTIFF.

vs.

NIMROD LONG, J. B. BRIGGS, AND M. B. MORTON, PARTNERS UNDER THE NAME, FIRM AND STYLE OF N. LONG & CO., DEFENDANTS.

Writ of Error.

STATEMENT OF THE CASE.

The petition states that Humboldt Township on the day of 18 made its several negotiable Township Bonds, and then and there issued the same, and put them in circulation for the purpose of

subscribing to the capital stock of the Fort Scott and Allen County Railroad Company, and for the construction of the same through said Township, in pursuance of an act of the Legislature of the State of Kansas, entitled "An Act to enable municipal Townships to sub-"scribe for stock to any Railroad, and to provide for "the payment of the same. Approved February 25th, "A. D. 1870."

The petition sets out a number of interest coupons that were attached to said bonds, with the usual averments that they were due and unpaid, and that demand had been made and payment refused, and that the Plaintiffs below were the *bona fide* holders of said bonds and coupons, and entitled to a judgment for the interest due on said coupons to the amount of seven hundred dollars.

The answer admits that the Plaintiffs below are citizens of the State of Kentucky, and that the Defendant is a corporation in the State of Kansas as alleged in the petition, but denies each and every other allegation contained in the petition. This answer is duly verified and puts in issue the validity of the bonds and coupons, set out in the petition of the Plaintiffs below. A jury trial was waived, and the cause submitted to the court, and judgment rendered for the plaintiffs. On the trial of the cause the judges were divided in opinion on certain questions particularly stated in the certificate of division contained in the record and which is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Kansas.

Nimrod Long, J. B. Briggs and M. B. Morton, partners as N. Long & Co., Plaintiffs. *Vs.* Humboldt Township, Allen County, Kansas, Defendants.	Certificate of division of opinion. Justice Miller and Judge Foster.

Be it remembered, that on the 11th day of May, 1874, the Plaintiffs in the above entitled action filed their petition in said court, praying judgment against said Defendant for the sum of $700.00 with interest thereon from the 3d day of January, at the rate of 7 per cent., which is alleged to be due on interest coupons attached to certain bonds, which it is in said petition alleged, were issued by the Defendant to the Fort Scott and Allen County Railroad Company, pursuant to the provisions of Chapter (90) ninety, of the Laws of the State of Kansas, in the year 1870, which said bonds were duly registered by Plaintiffs, before the commencement of this action, in the Auditor's office of said State. And afterwards the Defendant filed its answer to said petition, which answer consisted of a duly verified denial of the execution of said bonds and coupons, by the Defendant, or by its authority.

And afterwards at the regular June Term of said court for the year 1875, Justice Miller, presiding, judgment was rendered in said action; after trial upon the issues joined; in favor of the Plaintiffs, as prayed for in the Plaintiff's petition, and among other facts established by the evidence in said action were the following:

1st. That the bonds mentioned in the Plaintiff's petition were a part of an issue of bonds, amounting in the aggregate to seventy-five ($75,000) thousand dollars, and that said bonds and the coupons sued on, were of the same tenor and effect as the copy of bond and coupon hereto attached, and marked "A" and made a part hereof.

2d. That the only vote authorizing the issuing of these bonds, was at a special election held in the Defendant Township, on the 4th day of April, eighteen hundred and seventy-one (1871).

3d. That the order of the Board of County Commissioners directing said election to be held, was dated and made on the sixteenth (16th) day of March, eighteen hundred and seventy-one (1871).

4th. That from the latest assessment rolls in existence, at the date said vote was taken, to-wit: the assessment rolls for the year eighteen hundred and seventy (1870) it appeared that the total value of all the taxable property within said Defendant Township amounted to four hundred and fifteen thousand dollars ($415,000). and there was no other evidence introduced on the trial of said cause tending to show the value of the taxable property in said Township, save and except said assessment rolls. And the judges were divided in their opinions upon the following questions which arose upon the trial of said cause. and are presented by said facts, to-wit:

1st. Are the bonds to which the coupons sued on, were attached, negotiable bonds, such as to entitle the Plaintiffs to the benefits of a *bona fide* holder of ne-

gotiable paper taken in the ordinary course of business before maturity?

2d. Are the bonds rendered invalid by reason of the election above mentioned having been held within less than thirty days, after the date of the order calling therefor?

3d. Were the assessment rolls above mentioned the proper evidence from which the Commissioners were to determine the value of the taxable property of the Township; and are the bonds mentioned in Plaintiff's petition invalid by reason of having been voted and issued in excess of the statutory limit, as shown by said assessment rolls?

JUDGES' CERTIFICATE.

We do hereby certify that the above and foregoing is a true and correct statement of the proceedings in the above entitled action of N. Long & Co., vs. Humboldt Township, and that the facts therein alleged to have been shown in evidence were established by the evidence introduced upon the trial of said cause; and that the above questions arose upon the trial of said cause and were presented by the pleadings in said cause and the evidence introduced upon the trial of the cause. And we further certify that the judgment rendered in said action depends upon the determination of said questions. And we further certify that we the Judges holding the term of court at which said judgment was rendered were divided in opinion upon each and all of said questions.

SAM'L F. MILLER, Justice.
C. G. FOSTER, District Judge.

EXHIBIT A. Copy of Bond and Coupon.

"Be it remembered that Humboldt Township, in "the County of Allen, and State of Kansas, is indebted "to the Fort Scott and Allen County Railroad Compa- "ny, or bearer, in the sum of one thousand dollars, law- "ful money of the United States, with interest at the "rate of seven per cent. per annum, payable annually "on the 1st days of June in each year, at the Banking "House of Gilman, Son & Co., in the City of New York, "on the presentation and surrender of the respective "interest coupons hereto annexed. The principal of "this bond shall be due and payable on the 31st day of "December, A. D. 1901, at the Banking House of Gilman, "Son & Co., in the City of New York. This bond is "issued for the purpose of subscribing to the capital "stock of the Fort Scott and Allen County Railroad, "and for the construction of the same through said "Township, in pursuance of, and in accordance with an "act of the Legislature of the State of Kansas: entitled "An Act to enable municipal Townships to subscribe "for stock in any Railroad, and to provide for the pay- "ment of the same; approved February 25th, A. D. "1870. And for the payment of said sum of money and "accruing interest thereon, in manner aforesaid, upon "the performance of the said condition, the faith of the "aforesaid Humboldt Township, as also its property, "revenue and resources, is pledged.

"In testimony whereof this bond has been signed "by the Chairman of the Board of County Commission- "ers, of Allen County, Kansas, and Attested by the "County Clerk, of said County, this 12th day of Octo- "ber, 1871. "Z. WIZNER,

"Chairman County Commissioners.

"Attest: W. F. WAGGONER, County Clerk."

Copy of Coupon. EXHIBIT A.

"Humboldt Township. $17.50.

"The Treasurer of Humboldt Township, Allen Coun-
"ty, Kansas, will pay bearer, the sum of seventeen and
"50-100 dollars, at the Banking House of Gilman, Son
"& Co., in the City of New York, on the 31st day of
"December, A. D. 1873.

"Z. WIZNER,
"Chairman County Commissioners.

"Attest: W. F. WAGGONER, County Clerk."

The act of the Legislature of the State of Kansas, (session laws of 1870, page 189,) so far as the same is material to this case, is as follows:

"SECTION 1. Whenever fifty of the qualified voters, they being freeholders, of any municipal Township in any County in the State, shall petition in writing, the Board of Commissioners of such County to submit to the qualified voters of such Township a proposition to take stock, in the name of such Township, in any railroad proposed to be constructed into or through such Township, and shall in such petition designate the railroad company and the amount of stock proposed to be taken, and the mode and terms of payment for the same, together with the conditions of such subscription, if any, it shall be the duty of such Board of County Commissioners to cause an election to be held by the qualified voters of such Township, to determine whether such subscription shall be made: *Provided*, That the amount of bonds voted by any Township shall not be above such an amount as will require a levy of more than one per cent. per annum on the taxable property of such Township to pay the yearly interest on the amount of bonds issued.

"SECTION 2. The Board of County Commissioners shall make an order for holding of the election contemplated in the preceding section, and specify therein the amount of stock proposed to be subscribed, the mode and terms of payment, the name of the railroad company, the conditions of such subscription, if any, as may be named in the petition, the day the election is to be held, and prescribe the form of the ballots to be used at such election for and against such subscription.

"SECTION 3. If the time for holding the next general election, after the date of making the order in the last section provided, shall not be more than sixty days, the said election provided for in the two preceding sections shall be held on the day of said next general election, and notice thereof shall be given and the election held and returns thereof made, and the result ascertained and proclaimed, as may be provided by law for general elections.

"SECTION 4. If the next general election to be held is more than sixty days from the date of said order, then the Board of County Commissioners may order a special election to be held in not less than thirty days, and make an order for the same, specifying as in the order in the preceding sections, and also specifying how notice shall be given, which shall be by publication in some newspaper, if there be one published in the Township or County, and also by copy of the order posted up in at least three public places in the Township; in all other respects said election shall be held, returns thereof made, and the result ascertained and proclaimed as may be provided by law for general elections.

"SECTION 5. If three-fifths of the electors voting at

such election vote for the subscription of the stock, the Board of County Commissioners shall order the County Clerk to make such subscription in the name of the Township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such Township, to be signed by the Chairman of the Board and attested by the Clerk, under the seal of the County; *Provided*, That the Commissioners shall not cause such bonds to be issued until the railroad shall have been completed through the Township voting such bonds, or to such point in said Township as may be conditioned in said bonds.

"SECTION 6. Whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the Board of County Commissioners, annually, to proceed to levy and collect a tax on all taxable property in such Township, sufficient to pay the interest on such bonds as the same becomes due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected in cash, or the coupons of such bonds which may be due; and such tax shall be collected as County and Township taxes are collected, and paid out by the Treasurer on presentation of the coupons or bonds, when due, and the County Clerk, Treasurer and other officers, who may be required to do any act under the foregoing provisions, shall be entitled to the same fees as are allowed by law for similar services, and liable to the same fines and penalties for non-compliance."

Sections 7 and 8 of said act have no particular bearing on the questions involved in this case.

1st. The first question presented to the court by

this record, is whether the bonds to which the coupons sued on, were attached, are negotiable bonds, such as to entitle the Plaintiffs (in the court below) to the benefit of *bona fide* holders of negotiable paper taken in the course of business before maturity. We claim it was erroneous to hold these bonds negotiable. The essential qualities of negotiable paper as defined by Chief Justice Savage, in the case of Cook vs. Satterlee, 6 Cowen, 108, are, "that it be payable at all events; not dependent *on any contingency*, nor payable out of a particular fund; and that it be for the payment of money only, and not for the performance of some other act, or in the alternative." In Edwards on Bills and Promissory Notes, (2d edition, page 134, top paging), "The Bill "or note must not be made payable on any contingency; "its payment must not be made to depend on any un- "certain event." It is needless to multiply authority to show that paper to be negotiable in the commercial sense of the term, must be unincumbered with conditions. If the payment is made to depend upon an event which is certain to arise, and uncertain only in regard to the time when it will take place, the note or bill is valid and negotiable. But if the payment is made to depend on a condition that may or may not ever happen the law does not regard such instruments, incumbered as they are with such conditions, as negotiable paper. They may be assigned, but the assignee must take them subject to all equities. For the purpose of determining whether the paper is negotiable or not, we must look to the paper itself. If it apears on its face that the promise to pay is made to depend on a condition that may never take place, on a contingency that may never happen, it is not negotiable. Now, in exam-

ining the so called bond in this case, it is found to contain this provision in the body of the instrument. "This "bond is issued for the purpose of subscribing to the "capital stock of the Fort Scott and Allen County Rail-"road, and for the construction of the same through "said Township, and for the payment of said sum of "money, and accruing interest thereon in manner afore-"said, *upon the performance of the said condition*, the "faith of the said Humboldt Township as also its prop-"erty, revenue, and resources is pledged." It will be seen that by the express terms of the bond, it is made payable with the accruing interest, on the performance of the condition that the road shall be constructed through Humboldt Township, a condition that may never happen. It is certain it has never happened yet, and there is no prospect that it ever will happen. We are not at liberty to explain how the railroad got possession of these bonds, as the record does not disclose the facts, but it is very obvious that if the railroad had been constructed through the Township at the time the bonds were delivered, there would have been no necessity for putting this condition in the bond, and we know that if the railroad had performed this condition before the delivery of the bonds that it would have insisted on leaving out the condition altogether, and the County Board could have had no object in putting it in the bond. We think it is obvious from reading the bond in connection with the proviso at the close of the 5th section of the above statute, that it was agreed between the County Board and the railroad company to substitute the condition in the bond, that it was to be paid when the road was completed through the Township, for the condition in the proviso that the Commissioners

should not cause such bonds to be *issued* until the railroad was completed through the Township. This was a safe arrangement for the County Board to make for the protection of Humboldt Township. If the bonds are not delivered until the road is completed the Township is protected, and if the bonds are not to be paid until the road is completed, the Township is equally protected. It may have been and no doubt was desirable for the railroad to get possession of these bonds, and they would be willing to take them with the condition, that they were not to be paid unless the road was constructed through the Township. Whatever may have been the motives of the railroad company in making this change, the fact is, that they did make it, and accepted the bonds with the condition that the Township would pay, &c., on the performance of this condition. The bond is the evidence of the contract between the parties, the railroad company on the one part, and the County Board on the other, and we can't go outside of the written contract or inquire into to motives or inducements that the parties were governed by in making it. These bonds then, being payable on a condition that never may take place, and that condition appearing on the face of the bond, it is not negotiable, and the present holder took it subject to all defenses that could be made to it in the hands of the railroad company.

2d. The next question presented by the record, to the court is, "Are the bonds rendered invalid by reason "of the election above mentioned having been held "within less than thirty days after the date of the order "calling therefor?" It appears from the record that the order of the Board of County Commissioners directing a special election to determine whether these bonds

should be issued or not, was made on the sixteenth (16) day of March, A. D. 1871. That the only vote authorizing the issuing of these bonds was at a special election held in Humboldt Township, on the 4th day of April, A. D. 1871. There was therefore only about nineteen days notice of the time of holding the election to determine whether bonds should be issued or not. The fourth section of the act of 1870, under which these bonds purport to have been issued, expressly provides that the County Commissioners may order a special election to be held in not less than thirty days. A notice for less than thirty days is no notice at all, in legal contemplation. If the County Board can dispense with ten days of the time of notice, they can disregard the requirements of the statute in regard to notice altogether. This would be to deprive the citizens of all protection against the illegal acts of the County Board. It will be noticed that under the statute, the only agency the citizens of the Township are authorized to have in issuing the bonds in question, is to vote for or against their issue at a special election to be held in the Township after notice by the County Board for, not less than, thirty days before the day of the election. It is true that a petition was presented under the statute, to the County Board, which purported to be signed by fifty of the qualified voters and freeholders of the Township, asking the County Board to submit to the qualified voters of the Township, a proposition to take stock in the name of said Township, in the railroad. But this was not the action of the Township, nor of the qualified voters of the Township. It was the individual action of a few of the voters of the Township, and nothing more. Such movements we all know are generally got up by the railroads

or their employes and by a few who in some way are specially interested in the railroad company. Whatever may have been the action, therefore, of a few individuals acting in the interest of the railroad, we cannot say that the legal voters of Humboldt Township, had any notice of the special election to vote on the proposition to take stock. Nor can we say that the Township or the electors thereof, knew anything of the special election that was held on the 4th of April, 1871, except so far as the vote cast, may indicate a knowledge of a portion of the voters. The qualified voters of the Township and the Township itself having had no notice of the election, and consequently no opportunity to vote on the proposition to take stock. We have a right to say that the bonds in this case were issued by the County Board without the assent or knowledge of the Township of Humboldt, or the qualified voters of said Township. Had the bonds and coupons been issued by the Trustees of Humboldt Township, or by officers elected by and representing the Township, the case would present a very different question from the one presented by this record. It would then fall within that class of cases where this court has ruled that corporations are estopped from setting up as a defense to bonds issued by the corporate authorities, irregularities in the election, or in the returns, or insufficient notices of the election &c. The fact that the officers of the corporation issued the bonds and coupons is conclusive evidence that the officers have complied with the statute, when the question comes up between *bona fide* holders of these bonds for value, and the corporation. In other words, the municipal corporation is estopped from saying that its officers and those representing it, have not complied with the

law, and had therefore no authority to issue the bonds. With these decisions of the court we are entirely satisfied, but there is no analogy between these cases, and the case before the court. If the law had given to the Trustees of Townships the right to order an election, and give thirty days notice thereof, and on a favorable vote to issue bonds and coupons, as was done by the County Board in this case, there would be some reason and justice in saying that the Township would be estopped from saying that the officers of its own creation had not given notice of the election, or had omitted some other requirement of the statute, in a case between the Township and *bona fide* holders, of the bonds. We desire to call the particular attention of the court to the difference between this case and those alluded to as heretofore having been decided by this court. It is believed that the question presented in this record as to the doctrine of estoppel has never been passed on by this court. Can it be claimed, either on authority or reason, that Humboldt Township, that had no agency in giving notice of the election, and no agency in issuing the bonds and coupons in question, when in fact the whole business was transacted by officers of another distinct and separate corporation over which Humboldt Township had no control, can in any way be estopped from showing that these officers exceeded their authority in issuing these bonds, or that they acted without authority of law, or that they disregarded the statutory provisions requiring certain acts to be done by them before they could exercise the extraordinary power of issuing bonds in the name of Humboldt Township, imposing on that Township a debt of seventy-five thousand dollars. The County Board and County Clerk are by

the statute created special agents to give the notice, and on a favorable vote to issue the bonds and coupons in the name of Humboldt Township. The County Board consists of three members elected for two years by the qualified electors of the County, as is also the County Clerk, who acts as Clerk for the County Board, and is the custodian of the County Seal and of the records and papers of the office. The county board is created by the Legislature a body corporate and clothed with certain powers for administrative purposes. Municipal Townships are by law *quasi* corporations and elect their own officers, and are clothed by the Legislature with very limited local powers for administrative purposes. Not one of the members of the County Board may reside in Humboldt Township. Each County is divided into three Districts, each District elects a County Commissioner. The voters of Humboldt Township could not have possibly participated in the election of two of the Commissioners who constitute a majority of the Board and as to the third he may have been a non-resident of the Township and may not have had a dollars worth of property in the Township and may have been elected in spite of the opposition of every vote in the Township. The same may be said of the County Clerk whose signature is appended to these bonds. He is an officer elected by the voters of the entire County. No one of these officers of the County may own any property or be liable to pay any taxes in Humboldt Township, so far as this railroad subscription is concerned, they are in fact, in no sense of the word, the representatives of the people of Humboldt Township. It may be a matter of entire indifference to them, how much Humboldt Township is indebted, or what amount of taxes the people of

that Township have to pay. The statute by making the County Board and County Clerk the legal agents to issue these bonds and bind the Township to pay them, forces the agents on the Township *nolens volens*, and such an agent being a special agent, should on every principle of law and reason, be held to a strict compliance with his authority. Whenever he steps beyond his authority, or fails to comply with any material duty required of him by law, in the performance of his agency, his acts should be and are held void, as to the party affected thereby. The record does not disclose, in this case that Humboldt Township, has ever in any way ratified these bonds. Indeed under the law the Township has nothing to do in relation to them except to pay. The County Commissioners order an election, and give, or are required to give the notice. If the result of the election is favorable, the County Board orders the subscription to be made by the County Clerk in the name of the Township, and then they issue such bonds as may be required by the terms of said vote and subscription, in the name of the Township, signed by the chairman of the Board, and attested by the County Clerk under the County Seal. (See 5th section of the act of 1870.) By the 6th section of the above act the County Commissioners are to levy the tax and pay the interest and create a sinking fund, so that in fact Humboldt Township is entirely passive in the business, except the people have to pay and discharge the obligations imposed on them. We say imposed on them, because they never have had an opportunity to vote on the proposition to subscribe for stock. They have no agency under the statute in incurring this indebtedness except to vote for or against the subscription. If the electors of the Town-

ship have had no opportunity to vote on this proposition, then the bonds are issued without the consent of the electors of the Township, or without any agency on their part, whatever, and without legal authority, and are void in the hands of whosoever may hold them.

3d. The third question presented by the record for the consideration of this court is, "were the assessment rolls above mentioned the proper evidence from which the Commissioners were to determine the value of the taxable property of the Township, and are the bonds mentioned in Plaintiff's petition invalid by reason of having been voted and issued in excess of the statutory limit as shown by the said assessment roll."

The first section of the act of 1870, provides that the amount of bonds voted by any Township, shall not be above such an amount as will require a levy of more than one per cent. per annum on the *taxable property* of said *Township*, to pay the yearly interest on the amount of bonds issued. It appears from the facts found by the court below, that the County Board issued to the Fort Scott and Allen County Railroad Company, in the name of Humboldt Township, a series of bonds of one thousand dollars each, amounting in the aggregate to seventy-five thousand dollars. That the order for the election was made on the 16th of March, 1871, and the only election ever held took place on the 4th of the following April. That the assessment rolls of 1870, showed that the total value of all the taxable property in Humboldt Township, amounted to four hundred and fifteen thousand ($415,000) dollars. A levy of one per cent. on this sum, which is all the statute authorizes, would amount annually to $750.00. The amount of levy

required to meet the seven per cent. interest on the bonds issued would be $5,250.00. It will thus be seen that the amount of bonds issued is largely in excess of the amount authorized by the statute, if the assessment roll of the taxable property in Humboldt Township for the year 1870, is to govern. There was no other assessment roll in existence by which the County Board could be governed. The County Board on the 16th day of March, 1871, ordered the proposition on which these bonds were to be voted, to be submitted to the voters of the Township. This was long before the assessment of real estate for the year 1871, could have been completed. See Session laws of 1870, Section one, Page 245. By this section each Township assessor shall on or before the 20th of June, of each year, make out and deliver to the County Clerk of his County, a return in tabular form in a book to be furnished him by said Clerk, of the quantity, description, and value of each parcel of real estate subject to taxation in his Township, &c. A like return is made of personal property. This constitutes the assessment roll for the year, and contains all the taxable property in the Township, and is filed in the office of the County Clerk, and is a matter of public record in said office, and is open to the inspection of everybody, and is notice to the world of the amount of taxable property in the Township. No other property can be taxed except what is contained on the assessment roll, and when the statutes authorizing the issuing of these bonds speaks of the "taxable property of such Township," it means the property on the assessment roll filed in the office of the County Clerk, as no other property can be taxed. The County Board has no authority to levy a tax for any purpose on any property

except that which is contained on the assessment roll filed in the office of County Clerk, hence it follows that the taxable property of a Township is the property contained on the assessment roll. We therefore conclude that when the Legislature passed this law, making the value of the taxable property of the Township, the standard by which to determine the amount of bonds which could lawfully be *voted*, it had reference to existing laws on the same subject, and intended the value as shown by the last assessment roll, on file in the office of the County Clerk, at the date of the order submitting the proposition to be voted on, and that the validity of the bonds in question must be tested by the assessment roll of 1870, which was the only evidence known to the law from which the County Commissioners could ascertain the value of the taxable property of the Township, and was the only evidence offered, or attempted to be offered on the trial going to show the valuation thereof. This evidence shows that these bonds are largely in excess of the statutory limitation, as will appear by reference to the assessment roll of 1870. It will be conceded in this case that the County Board is made by the act of the Legislature, the special (not general) agent of the Township, to give the notice, and on a favorable vote, to issue the bonds in the name of Humboldt Township. The powers of this special agent are limited by the statute, and it has no authority except what is expressly delegated in the statute. It is a general rule that a person dealing with an agent of limited powers is bound to examine the authority of that agent. In the case of Shemmelpennick vs. Bayard, 7th Curtis, Supreme Court decisions page 577, from 1st Pet. Rep. 290, the court say "It is believed to be a general rule that

an agent with limited powers cannot bind his principal when he transcends his powers. A person transacting business with such an agent is bound to know the extent of his power." The principal is not bound by the acts of the agent beyond his authority. Story on Agency, page 160. Section 170. In the case of Beals vs. Allen, 18 John. Rept. 363, the court say, "A special agent has no authority to bind his principal." If this doctrine is applied to special agents when the principal himself appoints the agent, it applies with much more force to a case like this where the principal had nothing to do with the appointment of the agent. All persons dealing with special agents created by statute are bound to take notice of the statutes under which their authority is derived. And all persons dealing in securities issued by these statutory agents are not only bound to take notice of the law under which they act, and of all the limitations and restrictions on their powers, but they are chargeable with notice of all facts relating to the exercise of their powers, which appear of public record. Hence we say that those dealing in these bonds were bound to take notice of the assessment roll for 1870, in the office of the Clerk of the County Board, and which existed there as a matter of record, and showed the amount of taxable property in Humboldt Township when the pretended vote was taken on the issue of the bonds. The law itself is notice to all persons dealing in these bonds, as to the limitation of the powers of the Board, and the public records in the office of the County Clerk is notice that the County Board has exceeded the statutory limits in issuing bonds. In a case like this there can be no innocent holder of these bonds. The County had no authority to issue them, having given no

notice of the election, and having issued them greatly in excess of the statutory limitation. In Dillon on Municipal Corporations, page 374, Section 381, it is said to be a general principle of law, beyond controversy, that the agents, officers, or even City Council of a municipal corporation, *cannot bind* the corporation by any contract which is beyond the scope of its powers. It is laid down by the same author, Section 426, page 149, section 108, that a municipal corporation may successfully defend against the bonds in whosoever hands they may be, if its officers or agents who assumed to issue them had no power to do so. See 22 How, 364. We will call the special attention of the court to the case of Marshall County vs. Cook, 38 Illinois Rept., page 46. We think the reasoning of the court in that case, so far as the points under discussion in this case are concerned, is entitled to much consideration. In the case of Gould vs. The Town of Sterling, 23d New York, Rept. 456, at page 463, it is said, "No representation of the "agent as to the fact of his agency, or as to the extent "of his power, is of any force to charge the principal. "But it being shown by other evidence that the agency "existed, and that the act done was within the general "scope of the power, the principal is bound by the rep-"resentations of the agent as to any essential facts "known to the agent, but which the party dealing with "him had no means of knowing." The reason on which this rule is founded, is that given by Lord Holt in Hern vs. Nichols, (1 Salk 289), viz: "That when one of two innocent parties must suffer, through the misconduct of another, it is reasonable that he who has employed the delinquent party, and held him out to the world as worthy of confidence, should be the loser." "This reason

"can of course, only apply to a case where the princi-
"pal has himself employed the agent, and voluntarily
"conferred on him power to do the act. This clearly is
"not such a case, the agents here were designated not
"by the Township, but by the Legislature; and no pow-
"er whatever was conferred by the Township unless the
"assent of the tax payers was obtained." This reason-
ing of the court is entirely applicable to the case before
the court, and sustains the views we have expressed
above. The same doctrine was sustained by the subse-
quent cases of The People vs. Mead, 24 N. Y. 114 and
36, N. Y. 224. Judge Cooley commenting on the doc-
trine of Gould vs. Sterling, says: "This doctrine appears
to be sound, that whenever a want of power exists, a
purchaser of securities is chargeable with notice of it, if
the defect is disclosed by the corporate record, or as in
that case by *other records*, when the power is required
to be shown." (For a further discussion of this ques-
tion, and other authorities, see the note at the foot of
page 216 of that work.)

There is no recitals in the bonds in this case, except that they are issued pursuant to the acts of 1870. That act is notice to all parties dealing in these bonds, that the County Board is limited in issuing bonds to an amount that will not require more than one per cent. per annum on the taxable property of the Township, to pay the yearly interest. The statute of the State as above shown, requires the assessment roll to be filed in the office of the County Clerk, and is then a matter of record. Even a *bona fide* holder of these bonds is bound to take notice of the want of authority to issue them, which appears on the records of the County. 12 Pick

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545; 11 Wall. 146; 12 Iowa 203. If the purchaser had gone to the recorded proceedings on which they are based, he would have found enough to convince him that these bonds were not only issued without authority of law, but palpably and knowingly against law, and were in their inception a fraud and a swindle on the tax payers of Humboldt Township. In a case like this the bond holder is not the only person entitled to protection. The tax payer is entitled to equal, if not greater consideration. The bond holder could have protected himself by using ordinary diligence in examining the records of the office of the County Board, but the tax payers never having had any legal notice of the election, had no means or power to protect themselves against this large and fraudulent debt. We will call the attention of the court to the very able opinion of the Supreme Court of this State by Judge Brewer, recently reported in 12 Kansas, Rept. page 200. In this case the authorities pro and con are reviewed by the learned Judge, and much that is said has a direct bearing on the question involved in the case before the court, and we cannot do better than to refer the court to that opinion and the authorities referred to and commented on.

With respect to the question of over-issue we do not complain of an irregularity or excess of authority on the part of the agents of the Township merely, but rather a want of power in the Township itself, for it will be observed the statute prohibits the Township from voting bonds in excess of the statutory limit. The doctrine of estoppel can have no application here. It can only be applied in case of acts which the corporation might lawfully have done, but the corporation cannot be estopped

from showing that the act was one which it could not do at all. But for the fact that this case is governed by the rule laid down in Gould vs. Sterling, with respect to acts of agents not chosen by the Township, it might be perhaps the Township would be estopped from showing no election was held for that might lawfully and should have been done, but under no circumstances can a Township vote bonds in excess of the limitation. Whether or not the vote was in excess of the limit was not a matter to be determined judicially by the Board. It was a matter to be determined by a simple inspection of the records which are open to the whole world.

Upon this question of over-issue the following which we quote from an article understood to be written by Justice Beck of the Supreme Court of Iowa, which appears in the January 1872 number of *The Western Jurist*, will be found applicable:

"The city, as all other municipal corporations, can exercise no power not conferred by law; upon the law, from which its existence is derived, it depends for all authority. It is a creative and positive enactment, and all its powers flow therefrom. Of course we will not be understood as intimating that the means and manner of the exercise of power must be prescribed by express enactment, but that the power itself depends thereon. *Clark* vs. *City of Des Moines*, 19 Iowa, 200; *Richard* vs. *Warren County*, Supreme Court of Iowa at its June Term 1871; *Clark, Dodge & Co.* vs. *The City of Davenport*, 14 Iowa, 494; *Booth* vs. *Town of Woodbury*, 32 Conn., 118; *Webster* vs. *Town of Harvinton*, Id. 131; *Ally* vs. *Inhabitants of Edgecombe*, 53 Maine, 446, *Leavenworth* vs. *Norton*, 1 Kansas, 432; *Kyle* vs. *Malin*,

8 Ind., 34; *Ex parte Burnett*, 30 Ala., (N. S.) 461; *Hooper* vs. *Emery*, 14 Maine, 375.

"An act of a municipal corporation, done in an attempt to exercise power not possessed by it is void. This is corollary of the doctrine just announced. If it were not so, power could be exercised which is not conferred and the corporation would possess authority independent of the legislature, which is contrary to the proposition above stated, which is so well supported by principle and the cases.

"There is no distinction in reason between the cases of entire absence of enactment conferring power, and a prohibition of its exercise beyond a certain limit. They are in fact one and the same case. In the first instance power is not granted, and is not therefore possessed; in the other it it expressly withheld, and its exercise prohibited, and is therefore not conferred. There is in each case a total absence of authority. The same is true where power is granted upon conditions. They must be complied with before the power passes to the corporation. It is equally plain that if power be conferred to be exercised to a certain extent and no farther, when the limit is reached the power ceases. These principles are evident, and do not require the support of authority. No other rules would keep corporations in subordination to the State, or be in harmony with the fundamental doctrine above announced, namely: all power of corporations is derived from positive enactment.

* * * * * * * * *

"These doctrines are well sustained by authority, and are not now for the first time to be recognized and applied by courts. The case of *Richards* v. *Warren*

county, decided at the June term, 1871, of the Supreme Court of Iowa, is not unlike in principle the one now supposed. In that case the limit, as provided by statute, upon the power of the county to expend money in building a court-house, was a vote of the people. A contract was made for the expenditure of a larger sum than was voted, under which the plaintiff claimed recovery. It was *held*, that the contract had no binding force for the reason that it exceeded the limitation imposed by the vote of the people upon the power of the county. There are numerous cases in the reports where acts of counties, and municipal and other corporations have been held void, because they exceeded the power conferred upon those bodies. We are not aware that a contrary doctrine has been, anywhere recognized. It is admitted by every one that, "If the bonds, as supposed, were issued without any authority to issue bonds, they would be clearly void.' But some insist, 'If the power to issue exists, and is irregularly exercised, or is exercised in disregard of conditions and limitations, the *bona fide* holder is protected.' We have established above that a condition or limitation upon a power, whereby it ceases at a certain point, as effectually defeats its exercise beyond the limit, as though no power had been granted at all. The statement of the rule, as admitted, is utterly inconsistent with the exception insisted upon. When the limitation is passed, there is the same absence of power as though none had ever been conferred; otherwise the condition in limitation would be without effect.

"It is insisted by some that if the bonds are issued and negotiated without objection by anyone, they are, in the hands of *bona fide* holders, without notice of their infirmities, binding upon the city. This position is bas-

ed upon the argument just noticed and the supposed injustice of a contrary doctrine. It is argued by some that if by the silence of the inhabitants of the city the bonds are permitted to be issued and put upon the market, it will operate to the injury of innocent purchasers, and the inhabitants ought to be concluded; and in this view, it is insisted, while admitting that, if the bonds were issued without authority they are void, that the city is bound by them as the limitations and conditions which circumscribed their power have only been overstepped. Several cases are sometimes referred to in support of this position. Some of them, in our opinion, fail to do so. It appears in those cases that the power was conferred upon the corporation by proper legislation, but was irregularly exercised in the manner or means of its exercise, and not in accord with law. They are not cases of limitation of power or of absence thereof. Other cases sometimes cited seem to support that position. They are based, however, upon the equitable ground of protection to *bona fide*, innocent holders of commercial or marketable paper.

"The cases are not numerous and are overcome, in our opinion, both by authority and reason in support of the contrary doctrine. The Supreme Court of Iowa in many cases has uniformly held that in the absence of power to execute municipal or county bonds, no subsequent transfer thereof will give them effect, but they will be held void in the hands of *bona fide* holders. *Hall & Argolls* v. *The County of Marshall*, 12 Iowa, 142. *Clark* v. *The City of Des Moines*, 19 Iowa, 200. *Smith* v. *Henry County*, 15 Iowa, 385. *Chamberlin* v. *The City of Burlington*, 19 Iowa, 404.

"The holders of the instrument in question cannot

claim to be innocent purchasers without notice. They are purchasers of the obligations of a municipal corporation and were bound to know that the city only possessed express and limited powers. It had not, as the purchaser was bound to know, general power to enter into contracts, and borrow money. The purchaser was required, for that reason, to look into the power of the city and examine the acts of its officers by whom the bonds were issued, in order to ascertain whether the law authorized the instruments and conferred authority upon the corporation and its officers to issue them. The like rule is applicable to instruments of all kinds issued by those exercising special and limited powers. It is the settled doctrine of the Iowa Supreme Court. *Hall & Argolls* v. *The County of Marshall*, 12 Iowa, 142. *Clark* v. *The City of Des Moines*, 19 Iowa, 200. *Richard* v. *Warren County*, *ante*.

"The same rule is announced and fully recognized by the U. S. Supreme Court in the recent case of *Marsh* v. *The Supervisors of Fulton County*, 10 Wallace, 676, S. C. 5th West. Jur., 166. It is there held that a holder of a county bond 'was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.' It is claimed by some that a different doctrine is recognized in the prior cases decided by the U. S. Supreme Court involving municipal and county bonds. It will be found, however, upon an attentive examination, that the decisions referred to do not go to that extent. In *Aspinwall* v. *Knox County*, 21 How.. 539, and probably in some other cases, it is

held that the purchaser is required to look no further than the instruments to ascertain whether the law authorizing it has been complied with. It is not held that the bond itself is evidence of power in the corporation to issue it. But should there be, to some extent, a conflict between the recent case of *Marsh* v. *The Supervisors of Fulton County*, and prior adjudications in the same court, the last decision, which was concurred in by the whole bench, appears to be well supported by reason, and the principles of the law. It is in accord, too, with *Aspinwall* v. *The County of Daviess*, 22 How., 365, in which it is held that county bonds issued in violation of the constitution of the State, are void, even though held by *bona fide* purchasers, without notice of their infirmity.

"In our opinion the fact that the bonds in question are held by innocent purchasers does not render them valid against the city.

"A position is sometimes assumed which demands further consideration. It is this: The inhabitants of the city having stood by in silence and permitted the bonds to be issued, cannot now be heard to object to them, when they are in the hands of an innocent party.

"This argument is answered, by the view we have just presented, as the holder's duty. It rests upon him to ascertain the authority of the city to issue the bonds. He therefore cannot claim the protection accorded to the holder, in good faith and without notice, of all instruments denominated negotiable or commercial paper.

"But suppose they are estopped to dispute the validity of their city bonds; all the tax-payers of the

city are affected in the same manner, and to the same extent. No tax-payer, therefore, can resist the bonds, and the corporation and its officers are equally estopped to object to them. There is, therefore, no one who can contest their validity. It follows that the bonds, though illegal and void, having been issued without authority, can be enforced against the city, and thus the plain and direct provision of the constitution of the State is defeated and disregarded. The argument proves too much, and is thus completely answered.

"An argument in support of the position, that such bonds are valid in the hands of *bona fide* holders, is based upon the doctrines governing principals and agents, which, it is insisted, are applicable to the case we are discussing. The municipal authorities, it is claimed, are the agents, the city is the principal, and its charter or the law in question, the power of attorney. It is said that the law gives the city authorities power to create an indebtedness to a certain extent. They may create a debt but are limited in the exercise of the power as to its extent. Now, applying the rules fixing the liability of a principal, it is claimed that as the city authorities have the power to create a debt, the city will be liable upon the indebtedness, when held by innocent parties, even though the limit upon the exercise of the power be passed in its creation. The fallacy of this argument is at its very foundation. *The restriction in the law in question is not upon the power of the city officers, the agents as they are considered; it is upon the city itself*, which in the argument is made to represent the principal. By the constitution the city is forbidden to contract the indebtedness. Power is not only withheld but a prohibition placed upon its exercise. Applying the

theory of principal and agent as suggested, we have the case of an act done by an agent, which the principal had no power to do, regarded as valid, because it was done by an agent, a result that cannot be admitted.

"It is readily seen that the rules relating to principals and agents have no application to the question we are considering, and do not even serve to illustrate the principles involved. The city authorities execute the power granted to the city, not as agents, but in the discharge of the functions of the municipal government. The municipal power is exercised through the city officers. They are instruments for the exercise of power conferred by the city charter. They constitute the government of the city. They derive their authority from the charter, not from an ideal being called the city. The constitutional prohibition acts directly upon them.

"In weighing this argument the nature and effect of the constitutional inhibition upon the city to issue the bonds must not be overlooked. It is a prohibition upon the exercise of the power, by forbidding the Legislature to confer authority upon municipalities to create indebtedness beyond a certain limit. The creation of such an indebtedness is not only unauthorized but illegal and contrary to the settled policy of the State as declared in the constitution. Will the assent of the people of the city, in their corporate capacity, make the bonds valid? Certainly not. That assent was given by the act of the municipal government in issuing the bonds. It must be admitted that the mere issuing of the bonds does not make them valid. Now suppose any tax-payer or any resident of the city, had in the most formal and solemn manner declared their assent to the issuing of the bonds, or after they were issued, to their

validity, would such action authorize any court to declare the bonds valid? If so, we must admit that the people of the city, may by their voice annul the constitution of the State, or the limitations of its charter. But this will not be pretended for this obvious reason; the constitution prescribes rules of law in regard to the government and policy of the State that are supreme. Whatever is in conflict therewith, the courts must regard as illegal and not of binding force, even though the people of the localities particularly affected thereby should, in a formal manner assent thereto. Constitutional prohibitions cannot be removed by such assent.

"The constitution provides that the General Assembly shall make no law respecting the establishment of religion, or providing religious tests as qualifications for officers of public trust. Now suppose that the General Assembly should, by law, permit the municipalities of the State to establish religion within their respective limits, or provide religious tests? Would it be claimed that the courts must sustain the acts of a corporation in the exercise of the power thus granted to it, on the ground that all of the people of the city assented thereto? No one will maintain such a doctrine. The people of a city cannot make for themselves such laws. Being in conflict with the constitution, which, until it be changed or abrogated in the manner therein prescribed, is paramount to the will of the people, we would declare laws of this character void, even though every being in the State affected thereby should assent to them. For the very same reason the courts must declare void the act of a city in issuing the bonds in question, even though it were done with the consent of all the citizens and tax-payers. Being against the policy of the State

as declared in the constitution, it cannot be made valid.

"The argument under consideration is based upon the position, that the inhabitants of a city by their silence are estopped to deny the validity of the bonds; that being issued by the city, by failing to object to them at a proper time, their assent will be presumed. It will be conceded that such implied assent can have no greater effect to make the instrument valid, than consent expressly given, which we have seen will not so operate.

"In support of opposite views, cases are sometimes cited where acts of corporations not within the scope of their express power are held not to be *ultra vires*. These are cases where the power exercised is authorized for a particular object, or the acts in question are required to be done in a particular manner, but the object and manner of the exercise of power are different from and in conflict with the charter of the corporations. It is held that such acts are not *ultra vires*. In these cases it will be remarked that the acts in question are authorized; the restrictions therein relate to their object or manner. The cases are therefore quite different from the one under consideration, in which the restriction is imposed upon the very exercise of the power without regard to the purpose or manner of its exercise. Suppose the charter of a city should authorize money to be borrowed to build a railroad. The money is borrowed but is expended in paving a street. The power to borrow money being conferred, the use of the money after it is borrowed could not affect the validity of the act of borrowing done in pursuance of the power.

In the case of *Miners Ditch Co.* vs. *Zallenbach*, 37

Cal., 453, sometimes cited and relied upon as an authority in point against our view, a private corporation for the purpose of consolidating its business and property with another corporation, conveyed all its lands. It was held that as it had the power to convey its property for some objects the purpose for which the conveyance was made, though admitted to be without the general scope of its power, did not invalidate the act. The case announces no principle in conflict with the views we have above announced, but on the contrary contains reasoning in their support. The following extract from the opinion of the court in that case, announced by Chief Justice Sawyer, very happily expresses the distinction we have just attempted to point out.: 'The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra-vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of persons dealing with corporations may vary, according as the act is *ultra vires* in the one or the other of these senses. All these distinctions must be constantly borne in mind in considering the question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corpora-

tion may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.'"

We think for the reasons above stated there is error in the judgment of the Circuit Court, and pray that this court may reverse the same.

WILSON SHANNON, AND
CATES & KEPLINGER,
Att'ys for Plaintiff in Error.

IN THE

Supreme Court of the United States

WASHINGTON CITY, D. C.

OCTOBER TERM, 1875

HUMBOLDT TOWNSHIP, ALLEN COUNTY, KANSAS, *Plaintiff*,
vs.
NIMROD LONG, J. B. BRIGGS AND M. B. MORTON, Partners as N. LONG & CO., *Defendants.*

Argument of G. C. CLEMENS, Attorney for Def'ts.

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Argument of G. C. CLEMENS, Attorney for Def'ts.

THE CASE.

N. Long & Co. recovered a judgment against Humboldt Township, Allen county, Kansas, at the June term, 1875, of the Circuit Court of the United States for the District of Kansas, on some coupons attached to some bonds of that Township. The Judges were divided in opinion upon certain questions, and the case comes before this Court for review, upon the following:

CERTIFICATE OF DIVISION.

In the Circuit Court of the United States, District of Kansas.

NIMROD LONG, J. BRIGGS AND M. B. MORTON, Partners as N. LONG & CO., *Plaintiffs*,
vs.
HUMBOLDT TOWNSHIP, ALLEN COUNTY, KANSAS, *Defendant.*

Certificate of division of opinion, Justice Miller and Judge Foster.

Be it remembered that on the 11th day of May, 1874, the Plaintiffs in the above entitled action filed their petition in said Court, praying judgment against said defendant for the sum of seven hundred dollars, with interest thereon from the third day of January, at the rate of seven per cent., which sum is alleged to be due on interest coupons attached to certain bonds which it is in said petition alleged were issued by the defendant to the Fort Scott and Allen County Railroad Company pursuant to the provisions of chapter (90) ninety of the laws of the State of Kansas in the year 1870. Which said bonds were duly registered by the plaintiff before the commencement of this action in Auditor's office of said State, and afterward the defendant filed its answer to said petition, which answer consists of a duly verified denial of the execution of said bonds and coupons by the defendant or by its authority.

And afterwards at the regular June term of said court, for the year 1875, Justice Miller presiding, judgment was rendered in said action, (after trial upon issues joined) in favor of the plaintiff as prayed for in plaintiff's petition, and among other facts established by the evidence in said action were the following:

1. That the bonds mentioned in plaintiff's petition were a part of an issue of bonds amounting in the aggregate to seventy-five thousand (75,000) dollars, and that said bonds and the coupons sued on were of the same tenor and effect as the copy of bond and coupon hereto attached and marked "A" and made a part hereof.

2. That the only vote authorizing the issuing of these bonds was at a special election held in the defendant township on the fourth (4) day of April, eighteen hundred and seventy-one (1871).

3. That the order of the Board of County Commissioners directing said election to be held was dated and made on the sixteenth (16) day of March, eighteen hundred and seventy-one (1871).

4. That from the latest assessment rolls in existence at the date said vote was taken, to-wit: The assessment rolls for the year eighteen hundred and seventy, it appeared that the total value of all the taxable property within said defendant township amounted to four hundred and fifteen thousand dollars, and there was no other evidence introduced upon the trial of said cause tending to show the value of the taxable property in said township save and except said assessment rolls; and the judges were divided in

their opinions upon the following questions which arose upon the trial of said cause, and are presented by said facts, to-wit:

1. Are the bonds to which the coupons sued on were attached negotiable bonds, such as to entitle the plaintiff to the benefits of a bona fide holder of negotiable paper taken in the ordinary course of business before maturity?

2. Are the bonds rendered invalid by reason of the election above mentioned, having been held within less than thirty days after the date of the order calling therefor?

3. Were the assessment rolls above mentioned the proper evidence from which the commissioners were to determine the value of the taxable property of the township, and are the bonds mentioned in plaintiff's petition invalid by reason of having been voted and issued in excess of the statutory limit as shown by said assessment rolls?

JUDGES' CERTIFICATE.

We do hereby certify that the above and foregoing is a true and correct statement of the proceedings in the above entitled action of N. Long & Co. vs. Humboldt township, and that the facts therein alleged to have been shown in evidence, were established by the evidence introduced upon the trial of said cause, and that the above questions arose upon the trial of said cause, and were presented by the pleadings in said cause and the evidence introduced upon the trial of the same. And we further certify that the judgment rendered in said action, depends upon the determination of said questions; and we further certify that we, the judges holding the term of court at which said judgment was rendered were divided in opinion upon each and all of said questions.

SAMUEL F. MILLER, Circuit Justice.
C. G. FOSTER, District Judge.

Ex. "A." Copy of bond and coupon.

Be it known that Humboldt township in the county of Allen and State of Kansas is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of one hundred thousand dollars lawful money of the United States, with interest at the rate of seven per cent. per annnum, payable annually on the first days of January, in each year, at the banking house of Gilman, Son & Co,, in the City of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on the 31st day of December A. D., 1901, at the banking house of Gilman, Son & Co., in the City of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township in pursuance of, and in accordance with an act of the Legislature of the State of Kansas, entitled "An Act to enable municipal Townships to subscribe for stock in any railroad,

and to provide for the payment of the same," approved February 25th, A. D., 1870, and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue and resources, is pledged.

In testimony whereof the Bond has been signed by the Chairman of the Board of County Commissioners of Allen county, Kansas, and attested by the County Clerk of said county, this 12th day of October, 1871.

Z. WISNER,
Chairman Board County Commissioners.

ATTEST:
W. F. WAGGONER, County Clerk.

Copy of Coupon, Ex. "A."

HUMBOLDT TOWNSHIP.

$17.50. The Treasurer of Humboldt Township, Allen county, Kansas, will pay the bearer the sum of seventeen and 50-100 dollars, at the Banking House of Gilman, Son & Co., in the city of New York, on the 31st day of December, A. D., 1873.

Z. WISNER,
Chairman County Commissioners.

ATTEST:
W. F. WAGGONER, County Clerk.

I will proceed to discuss the questions to be considered in their order:

NEGOTIABILITY OF THE BONDS.

Near the conclusion of these bonds is the following somewhat peculiar phraseology: "And for the payment of said sum of money and accruing interest thereon in manner aforesaid, *upon the performance of said condition*, the faith of the aforesaid Humboldt township as also its property, revenue and resources is pledged." The plaintiff contends that these words constitute a condition, and that therefore the bonds are non-negotiable. It will be observed that the bonds are payable absolutely on the 31st day of December, 1901, and are made payable to bearer. If they are non-negotiable they are made so only by the words referred to.

In a case decided by the Court of Queen's Bench, (16 Q. B. 333) the paper in controversey was an order "payable ninety days after sight, *or when realized.*" In deciding that it was not a good bill of exchange, Lord Campbell said . "If we could reject the words, 'or when realized' as insensible, the bill would, certainly, be unexceptionable." I think it very apparent that the supposed conditional words in these bonds are, in his Lordship's language, "insensible," and that the bonds are, therefore, so far as this objection to their negotiability is concerned, "unexceptionable." If these words contain a condition it must be the completion through the township of the railroad mentioned elsewhere in the bonds; and, if that is the condition, then it is an absurdity. The bonds recite that they are issued "in pursuance of, and *in accordance with* an act of the Legislature of the State of Kansas, entitled An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the pay-

ment of the same, approved February 25, 1870." Section five of that act provides "that the Commissioners *shall not cause such bonds to be issued* until the railroad shall have been completed through the township voting such bonds, or to such point in said township as may be conditioned in said bonds." If these bonds were issued "in accordance with" this legislative enactment, then, of course, they were not issued until the road had been completed through the township, or as agreed upon. By the recital referred to, does not the bond say that the road had been so completed before the bond was issued? What meaning then could such a condition possibly have, even if the bond contained it? This recital would destroy any such condition.

If any meaning is ascribed to these words, the bond will read in effect about as follows: "The Fort Scott and Allen County Railroad Company has completed its road through Humboldt township, and the same having been so completed, this bond is issued. Now, if the said railroad shall be completed through said township, this bond will be paid."

But do these words express any contingency? The language is, "upon the performance of the *said* condition." This clause does not purport to contain the condition, but speaks of one already mentioned elsewhere in the bond. What is the *said* condition? Where is it? The only language used in the bond with reference to the completion of the road, is this recital: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township."

This recital states the *purpose* for which the bonds were issued, but can it be said to contain a *condition?* If it read that the bond was issued *upon condition* that a railroad should be constructed through the township, then it might be properly referred to as "the said condition;" but it does not read that

way. The supposed conditional words themselves express no condition, but pledge the municipal faith, resources and revenues to the payment of the bonds and interest upon the *performance* of a contingency referred to as the "said" condition, but which is nowhere to be found in the bond, and as we have seen could have no meaning if it was found. I do not deem it necessary, therefore, to incur much expense in printing my lucubrations upon this question. It would be vastly more interesting were it not so plain. However, I will refer briefly to one or two decisions, not desiring to commit a breach of the time-honored custom of the plodding veterans of the profession, who never suffer the court to decide any question without being afflicted with an attack of authorities. I refer to the following authorities in compliance with this custom and because it is always done. They may not have any bearing on the case, but I have never understood that any such technical objection barred counsel from citing authorities :

In Stevens vs. Blunt, 7 Mass., 240; the instrument in controversy was payable to the plaintiff's order by the twentieth of May "or when he completed the building according to contract." It was contended that the note was not negotiable, because payable on a contingency—but the Court held the note payable absolutely at a day certain, and negotiable. There was a gentleman at the time this volume of reports was compiled, by the name of Ben. Rand, whose duty it was to attach notes to cases and darken what was not made sufficiently obscure by the opinions of the Court. This individual, utterly regardless of the feelings of succeeding generations of lawyers who might wish to use this decision as an authority, sought to ruin everything by appending one of his notes to the report of the case, which opens with these few encouraging words: "This decision is clearly wrong."

Permit me, however, to say that *he* is clearly wrong and that his opinion is not worth a cent as authority—the Court decided the case and he ought to have kept quiet.

In Goodloe vs. Taylor, 3 Howe's N. C. Rep. 458, the bond was payable "against the 25th of December, 1819, or when the house John Mayfield has undertaken to build me, &c." The Court held that the parties, by inserting a specific date of payment, had made the bond payable at all events, whether the house was completed or not, and that consequently the note was negotiable.

If these bonds are payable upon a condition, then when is the Railroad Company required to perform that condition? The bond mentions no time, and refers to no contract with reference to the completion of the road through the township. The conditional words pledge the faith of the township to the payment of the bonds and accruing interest upon performance of the condition. If the railroad should be completed in ten days was the bond to be payable immediately? If not then, the meaning must be that the bond was payable in thirty years, provided the road was completed at that time, and this would give the Company thirty years to complete its road. No such result could have been intended by these words. If there is a condition, it is the construction of the road through the township without limit as to time, and without provision for beginning, direction or termination—and it is kept in such uncertainty that it cannot be of any effect to destroy the negotiability of the instrument.

If the railroad had not been completed as agreed upon, when these bonds were issued, then the question which would arise would not be one of negotiability but of validity—for the bonds were prematurely issued. No question of premature issue is raised. This Court, presuming no

error, must assume that they were not prematurely issued, that they were issued only after the completion of the road, as agreed upon between the contracting parties. The law requires this to be the case before the Commissioners shall cause bonds to be issued; and as it is not claimed that this was not the case, it must be assumed here that the road had been so completed. How utterly absurd becomes this supposed condition in the light of this assumption! It can have no meaning. These bonds were voted April 4th, and were not executed till October 12th. It is possible that they were lithographed soon after they were voted, and that these conditional words were inserted then by way of precaution—but when they were actually issued, the law presuming the law obeyed, presumes that the condition had already been performed, and the very issuing of the bonds is itself evidence of such performance.

The coupons attached to the bonds contain no allusion to any condition. They are absolute promises to pay to bearer—certain sums at certain times. A coupon is not an independent instrument, but it is nevertheless a distinct instrument. It depends upon the bond for its validity, for if there were no bond there could be no coupon. But while it depends upon the bond for its validity, it does not depend upon it for its negotiability. It is perfectly consistent with law that a bond should be in terms non-negotiable, while its coupons are negotiable. The very power to attach coupons carries with it the right to choose their form. Can it be disputed, then, that a municipality having the *power* to issue bonds with coupons, has the power also to make the bonds non-negotiable and the coupons negotiable? They are distinct obligations. The one depends upon the other for validity, but it is independent in every other respect. The coupon may be de-

cleared upon without describing the bond, and it is unnecessary to produce the bond at the trial.

If the coupons were negotiable, then it matters not whether the bonds were or not. The defendants are protected as holders of commercial paper received before maturity in the ordinary course of business. The bonds are not in suit, but the coupons are, and they are negotiable beyond question. 21 How. 546.

THE LEGALITY OF THE ELECTION.

The law governing the election for these bonds is as follows:

Sec. 3. If the time for holding the next general election, after the date of making the order in the last section provided, shall not be more than sixty days, the said election provided for in the two preceding sections shall be held on the day of said next general election, and notice thereof shall be given and the election held and returns thereof made and the result ascertained and proclaimed, as may be provided by law for general elections.

Sec. 4. If the next general election to be held is more than sixty days from the date of said order, then the board of county commissioners may order a special election to be held in not less than thirty days, and make an order for the same specifying as in the order in the preceding sections, and also specifying how notice shall be given, which shall be by publication in some newspaper, if there be one published in the township or county, and also by copy of the order posted up in at least three public places in the township; in all other respects said election shall be held, returns thereof made, and the result ascertained and proclaimed as may be provided by law for general elections.

Section 4 provides for a special election, and says that such an election may be held "if the next general election to be held is more than sixty days" from the date of the order. No special election can be held if the general election should be within sixty days. Section 3 provides that "if the time for holding the next general election shall not be *more* than sixty days the election shall be held on the day of the said next general election." What next general election is here intended? Is it not the next election for township officers? This is a township law. It speaks throughout of townships and township bonds. It is fair to presume that when it speaks of "general election," therefore, that township election was meant.

If this view is correct, then this election being held on the 4th day of April, 1871, which was the first Tuesday in April, was held on the day of the "general election," and the order having been made on the 16th day of March, the election was properly held on that day, under section 3 of the act. Under that section thirty days' notice is unknown. If the general election is on the next day, the bond election must be on that day because it is less than sixty days after the order. True, the certificate of division says that the bonds were voted at a special election, but as it states the date of that election, and as section 3 simply provides that the bond election shall be held on the day of the general election, and not as a part of that election, the certificate of division is consistent with the ideas above advanced.

But if I am wrong in the proposition above stated, is the legality of this election a question which can be mooted in this case and in this Court? In the well known case of Commissioners of Knox County vs. Aspinwall, *et al*, in this Court, the question was whether the omission to comply with the law, in respect to the notices to be given of the election invalidated the bonds. The case before the Court assumed that the requisite notices were not given. The Court said:

"This view would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the Court, in this collateral way, in every suit upon the bond, or coupon attached, or by the Board of Commissioners, as a duty imposed upon it before making the subscription? The Court is of opinion that the question belonged to this Board. The

act makes it the duty of the Sheriff to give the notices of the election for the day mentioned, and then declares if a majority of the votes given shall be in favor of the subscription, the County Board shall subscribe the stock. The right of the Board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the Board itself, as no other tribunal was provided for the purpose."

These bonds recite that they have been issued in pursuance of, and in accordance with law. This recital estops the municipality from asserting that the bonds were not issued in compliance with law. In the case just referred to, there was a recital in the bonds then in controversy similar to that contained in the bonds now under consideration; and concerning this recital the Court said;

"The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of power," and cites a case in the Court of Exchequer, in England, where it being necessary to the legality of a bond given by a joint stock company that a resolution should be adopted authorizing it, that Court said, in speaking of a purchaser of the bond: "Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." This Court, citing that case, said: "The principle we think sound and entirely applicable to the question before us."

In the same case this Court said:

"The purchaser of the bonds had a right to assume

that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the Board, to the stock of the Railroad Company, and the issuing of the bonds."

In Railroad Company vs. Otoe County, in Nebraska, 1 Dillon's Rep. 341, the Court said:

"It appears from an act of the Legislature that on certain terms the defendant was authorized to issue its bonds; and bonds having been issued, and being, as alleged in the petition, in the hands of holders for value, before maturity, the presumption is that the election was held and the other necessary terms complied with, which would authorize the Commissioners to issue the bonds." See also, 2 Black 722; 3 Wallace 654; 24 How. 287; 1 Wallace 83, 384; 1 Black 386; 7 Am. Law Reg. (N. S.) 589.

OVER ISSUE.

Seventy-five thousand dollars of bonds were issued, bearing interest from their date at seven per cent. They were voted April 4th, 1871. The law under which they were issued provides that "the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued." The tax rolls of 1870 were the only evidence introduced to show the amount of taxable property in Humboldt township. They show that on the first day of March, 1870, the taxable property of the township was one hundred and fifteen thousand dollars. A levy of one per cent. on that amount of property would not pay the annual interest on the bonds in controversy. Under this statement of the law and the facts was the amount of bonds issued in excess of the limit allowed by the act from which they draw their vitality?

The tax rolls for any given year, show the amount of taxable property on the first day of March of that year. They are silent as to subsequent accretions and subsequent values. (See General Statutes of Kansas, 1868. Subject—taxes.) It is quite evident, therefore, that the tax rolls for 1870, could afford no guide to determine, upon what amount of taxable property the first levy must be made for the payment of the annual interest on bonds voted in April, 1871. Of course no levy could be made to pay interest until the bonds had been voted, and that was subsequent to March 1st, 1871, the time

to which the tax rolls of 1871 would relate, and hence the *first* levy for the payment of interest would be based upon the tax rolls of 1871, and not upon the tax rolls of 1870. But it is claimed that the tax rolls of 1871 were not in existence when these bonds were voted, and that, therefore, the commissioners could not have consulted them. That the only available source of information open to the commissioners *at that time* was the tax roll of 1870. That may or may not be true. But what of it, if it is? The question here presented is not what information the commissioners had upon the subject. We are not inquiring what amount of taxable property the commissioners believed or understood to exist in Humboldt township; but the question is, how much taxable property *did it have?* I care not what evidence the commissioners had before *them*. The question is, what did the evidence before the Circuit Court show? The law requires that the amount of bonds issued shall not be in excess of a certain proportion of the taxable property of the township. The taxable property of the township at what time? A year and thirty-four days before the bonds are voted? The law does not say so. When it says "the taxable property of the township," the law undoubtedly means the taxable property *at the time the bonds are voted.* The counsel for plaintiff in error do not dispute this—but on the contrary claim that the tax rolls of the preceding year constituted the only evidence upon which the commissioners could proceed to determine the amount of taxable property when the bonds were voted. Now, I believe I can safely assert this proposition: That if a levy of one per cent. on the amount of property taxable in Humboldt township *when these bonds were voted*, would pay the annual interest on the bonds, then there was no excessive issue. I believe I can also safely say that though the taxable property in 1870 may not have been sufficient to authorize these

bonds, yet if the taxable property *at the time they were voted* was sufficient that they are valid. If these propositions are true, then where is the proof that the issue was excessive? The tax rolls of 1870, could not in the nature of things afford any criterion of the taxable property in April, 1871. It might have been greater—it might have been less. What is necessary to make a case for plaintiffs in error is sadly wanting. The amount of taxable property *when the bonds were voted* must be shown to have been insufficient to authorize so large an issue.

Let us take some analogous cases. Suppose that instead of a certain amount of taxable property being required, the law had provided that not more than one thousand dollars in bonds should be issued for every one hundred adult inhabitants of the township, and let us suppose that bonds voted in 1869 were in litigation. No one would doubt that the law meant the adult inhabitants at the time of voting the bonds. But how is their number to be determined? The last national census being in 1860—counsel for plaintiff in error would have recourse to that—notwithstanding that children of twelve years then, would be twenty-one in 1869, or they would resort to the state census taken in 1865.

Let us come to our own case again, and suppose that instead of an assessment of property being made annually, the tax law should require it to be made every five years, and that the last assessment had been made in 1867. At that time this township may not have had a dollar of taxable property within its boundaries. Humboldt township may ever as yet have lacked

"A local habitation and a name."

While in April, 1871, she may have teemed with a busy, thrifty population, and have had a million of taxable property. Yet not a bond could she issue under this

law in 1871, because four years before she had no property—no name—and that state of facts must be conclusively presumed to continue until the assessment of the next year, shall transform the pauper into a millionaire. I cannot believe that a tax roll can legitimately *estop* a municipately from becoming wealthy. But it is asked upon what evidence could the county commissioners act? If I were a county commissioner and this conundrum were propounded to me I should seek in some way to answer it—but so far as the decision of this court is concerned, I say that question does not arise. It was the business of the county commissioners to find the amount of taxable property. How they did it I do not know and do not care. The law generously presumes they did their duty, and that they found taxable property enough to authorize the issue of these bonds. And it remains yet to be seen that they made any mistake about it.

But is not this whole matter settled by the decisions of analogous questions in this Court? Is there any difference in principle between the question at issue here and that decided by this Court in Bissel vs. City of Jeffersonville? (24 How. 299). The law then brought before the Court required that three-fourths of the legal voters of the city should petition the Common Council for the issuance of the bonds. No provision was made for taking a census to ascertain the number of legal voters, any more than the law now under discussion provides for an assessment to be made in order to ascertain the amount of taxable property. Counsel for plaintiff here would have contended in that case that the Common Council should have been guided by the last official census, and that if in a suit upon the bonds or their coupons the city had introduced in evidence such census, and the petition presented to the Council, that the Circuit Court was thereby duly consti-

tuted a Common Council, and had nothing to do but to compare the two documents to arrive at a judicial conclusion from Common Council premises. But to proceed: In that case when tried in the Circuit Court, the City of Jeffersonville was allowed to prove that the petition was not signed by the requisite number of legal voters, and it succeeded in its efforts and beat the case. This Court, on error, reversed the judgment of the Circuit Court, and in doing so took occasion to intimate that Federal Courts were not Common Councils. This Court said:

"Jurisdiction of the subject-matter on the part of the Common Council was made to depend upon the petition, as described in the explanatory note, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three-fourths of the legal voters of the city, else the Board could not act at all. None other than the Common Council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty."

Elsewhere in the opinion the Court says, in speaking of the action of the City Council:

"By the terms of the explanatory act they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three-fourths of the legal voters of the city. In making that investigation, however, it was not required that there should be a new petition, *and the law is entirely silent as to the manner in which it was to be conducted.* If the Common Council was composed of the same persons who had already passed

upon the question, further investigation was unnecessary, provided they were satisfied with their former determination. Such of the members who knew the record of the fact to be correct *might safely act upon their own personal knowledge without further inquiry;* and if there were any who had not been members of the Board when the prior determination was made, they might ascertain the fact in any mode which was satisfactory to themselves and their associates." Page 295.

The fact to be determined by the Board in that case was the number of the legal voters in the city. In this case the fact which it was necessary for the county commissioners to determine was the amount of taxable property in the township. In neither that case nor this, was any mode pointed out by the law to be pursued in ascertaining the fact to be determined, and I think it as true in this case as it was in that, that the Board might ascertain the fact to be settled in any mode which was satisfactory to themselves and associates.

But let us return to the act itself. What is meant by the taxable property of the township. Taxable property is, of course, property subject to taxation, and not merely such property as may have been mentioned in tax rolls. There may be much property in a township which is not returned by the assessor and which therefore does not appear upon the tax roll, but which is taxable nevertheless. Taxable and taxed are not synonymous terms. Hence when this law speaks of the taxable property of the township, it can scarcely be said that it means the taxable property as shown by the tax rolls alone. The fact is that the question here raised grows out of the language of other Kansas bond ~~loans~~ Cases which provides that the amount of bonds voted shall not be in excess of a certain per cent. of the taxable property "as shown by the tax rolls

of the preceding year." Had no such [illegible] ever existed in Kansas it is probable no one would ever have claimed that the tax roll of 1870 should be taken as the evidence of the taxable property of a township in April, 1871. These bonds made a *prima facie* case for the defendants under the decisions of this Court, and it becomes incumbent upon the plaintiff to show want of authority for their issue. This I contend they failed to do by introducing in evidence the tax roll of 1870. The Circuit Court was sitting to determine the actual amount of taxable property in April, 1871—and of that fact the tax roll of 1871 was the best evidence. It was not introduced. If the taxable property in April, 1871, authorized the voting of these bonds, then there was no excess of authority in their issue. If the Commissioners did not examine proper evidence, what of it? What difference can it make what evidence they proceeded upon? The question is, did they exceed their powers? To determine that question the tax roll of 1871 should have been examined by the Circuit Court, regardless of what evidence may have been before the Commissioners. It was not a question as to what *evidence* the Commissioners should have acted upon, but as to whether the facts in evidence before the Circuit Court showed an excess of power.

THE REGISTRATION ACT.

The certificate of the Judges certifies that the bonds in controversy were registered in the state auditor's office prior to the commencement of this action in the court below. What is the effect of such registration? Let us see. The registration act will be found in the session laws of Kansas of 1872, Chap. 68. Sec. 14, is as follows:

Sec. 14. Within thirty days after the delivery of such bonds the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate, the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

Section 15 is as follows:

Sec. 15. That the holder of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this state, may have the benefits of this act by having such bonds registered in the office of said auditor of state, as provided herein, for the registration of bonds [issued] by virtue hereof. It shall be the duty of the auditor of state, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same, of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds.

The auditor of state is by this act required to certify to three facts: First, that the bonds have been regularly and legally issued. Second, that the signatures thereto are gen-

uine. Third, that such bonds have been registered in his office according to law. These facts are required to be certified under the seal of his office.

He is, however, neither required nor permitted to certify to these facts as a matter of course upon the presentation to him of *any* bond for that purpose. Sec. 14—on the contrary says that "the auditor shall, *upon being satisfied* that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine," register the bonds and certify to the facts stated. If the bonds are registered under section 15, he must of course be *satisfied* that they have been issued according to the law authorizin g them instead of this act. How is he to be satisfied? He must determine the facts to which he is to certify in some way. He can only do so upon examination and upon some kind of evidence, and his certificate is an adjudication by a tribunal created by law to determine the facts adjudicated upon. Is not this adjudication final and conclusive as between the bondholder and the municipality? Can the certificate of the state auditor be collaterally attacked? If it is untrue, must it not be set aside in some direct proceeding brought for the purpose?

It will be observed upon perusing sections 16 and 17, that after registration all control over the right to refuse payment of the bonds is taken away from the municipality which issued them. The auditor is required annually to ascertain "the amount of interest accrued and to accrue before the tax for the next succeeding year shall be levied and collected, upon *all* bonds registered in his office." This amount being certified to the clerk of the county in which such bonds were issued, the *clerk* is required to levy a tax sufficient to pay the amount certified to him, and to place the tax so levied in separate columns upon the tax roll of the county, and this tax

when collected the treasurer is requested to pay over to the State Treasurer.

Suppose the clerk should refuse to levy the tax after receipt of this certificate, and he should be mandamused, could he respond to the writ by asserting that the bonds were illegally or fraudulently issued? His duty is ministerial and the State Auditor's certificate is but a mandate requiring him to do a ministerial act. If in this case, these bonds should be declared invalid, would it be any the less the duty of the State Auditor to certify the interest annually to the clerk of Allen county? The bonds would be still registered in his office and his certificate remain in full force. Would it not be his duty to require a levy to pay the very coupons now in controversy? And upon mandamus to require him to certify the amount to the County Clerk, or to require the County Clerk to levy the tax, would the decision of this Court in this case be any response to the writ? These are serious questions, and I believe now brought fairly before this Court for the first time. I will not attempt their further discussion, but leave their answer to the Court.

G. C. CLEMENS,
Attorney for Defendants.

IN THE

SUPREME COURT OF THE UNITED STATES.

HUMBOLT TOWNSHIP,
Plaintiff in Error,
vs.
N. LONG & COMPANY,
Defendants in Error.

From the District of Kansas.

FURTHER ARGUMENT FOR THE BONDHOLDERS,

Defendants in Error,

BY JAMES GRANT.

Being of counsel for various holders of bonds, in many respects like the case under consideration, I ask of the court permission to file this brief argument.

1st. These bonds recite that they are issued to pay for capital stock in the Fort Scott and Allen County Railroad, and for the construction of the same through the township, in pursuance and in accordance with an act of the legislature of the State of Kansas, entitled "an act to enable municipal townships to subscribe for stock in any railroad, and to provide for the

payment of the same, approved Feb. 25th, 1870." (Record page 4; Acts 1870, page 189.

The act in question provided that the amount of bonds voted should not be more than a levy of one per cent to pay the yearly interest, (§ 1). That the commissioners should make an order for holding the election, and should specify the amount of stock to be subscribed, the mode and time of payment, (§ 2); and if three-fifths of the electors should vote in favor thereof, the commissioners should cause the bonds to be issued in the name of the township, (§ 5); and when the commissioners should levy a tax to pay the interest and create a sinking fund, (§ 6); with which they should buy up the bonds, (§ 8).

Now the bonds recite that these things were done. There is no dispute that the bonds were valid, issued, delivered, subscription made and money received and paid on subscription.

The argument is in a nut shell. The act authorized the issue of bonds. It required the commissioners to determine the amount not over a given sum to be ascertained by a fact to be determined by the commissioners; to submit the question to a vote, and upon a certain majority, to issue bonds. The commissioners recite, in the bond, that they have done all things in pursuance of the law. (See Knox Co. *vs.* Aspenwall, 21 Howard, 539–545.)

Another answer to this ground of defence is that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition of the grant of power, had been obtained, from the fact of subscription by the board and the issuing of the bonds.

The bonds on their face import a compliance of the law under which they were issued. "The purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of power." (*Ib.* page 545.)

"Upon looking at the act we see that full power is conferred on the board to subscribe the stock and issue the bonds, when a majority of the voters have so determined." (*Ib.* page 544.)

In all the cases, which have been before this court, there is not a single departure from the principles laid down in this case.

"Were these then a law?" "The bonds, on their face import compliance with it." "The purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of power."

In Knox County *vs.* Aspenwall, the condition was that there should be an election. It was not complied with. In this case there is the same complaint, and also that the limitation was exceeded?

Is there any difference: By the law in Knox county no bonds could be issued without an election. In Humbolt, by the law, no bonds could be issued, above a certain amount, and an election; both conditions to be determined by the commissioners. Can ingenuity conceive any difference in the principle applicable to the cases. The estoppel of recital is as conclusive in one as the other.

There is another ground of estoppel: The township in this cause, by the recital of its bond, has received the stock for which this debt was created.

In Township of Pine Grove *vs.* Talcott, 19 Wallace, 678, this court cited, with approval, the following doctrine:

In Sedwich, on Statute and Constitutional Law, it is said: "It must be further borne in mind, that the invalidity of contracts made in violation of statutes, is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, when it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has the benefit of the agreement, cannot be permitted in an action founded on it, to question its validity. It would be in the highest decree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains. And the principle of this exception has

been extended to other causes. So a person who has borrowed money of a savings institution on his promissory note, secured by a pledge of stock, is not entitled to an injunction to prevent the prosecution of the note on the ground that the savings bank was prohibited by its charter from making loans of that description." The authorities referred to sustain the text.

This case was followed in State Board, etc., *vs.* The Citizens Street Railway Co., 47 Indiana, 407, 412, 413, where the court will find many other authorities in addition to those cited and approved in 19 Wallace, 679.

2. But there is even a more conclusive argument in favor of the validity of these bonds.

The Legislature, by the act of March 2, 1872, (see code, page 110), has validated these bonds.

"An act to authorize counties, incorporated cities and municipal townships to issue bonds, etc., aiding in the construction of railroads and providing for the registration of such bonds, the registration of other bonds, etc." (See sections 13, 14 and 15).

Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the Auditor of State for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures of the officers signing the same are genuine, register the same in his office, etc., and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, and that the signatures are genuine, and that such bonds have been registered in his office according to law," etc.

That the holder of bonds heretofore issued, and that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this State, may have the benefits of this act, by having such bonds registered in the office of said auditor, as provided herein."

Now, what more could have been done to equalize the issue of these bonds? The auditor has certified, that the signatures

were genuine ; that the bonds were regularly and legally issued, and the holder is entitled to the benefits of the act of 1872, giving increased security for the collection and payment of interest.

No language can make a validation plainer than this act.

The Legislature followed up this validation law of 1872 by the act of the 5th of March, 1875, page 188, authorizing the officers of this township to sell their stock issued to aid in building this railroad.

It says : (§ 1) "The trustee, clerk and treasurer of any township in this State that has heretofore, or shall hereafter, subscribe to the capital stock of any railroad corporation of this State, and has or shall issue bonds of such township in payment for such stock, etc., are hereby authorized to sell said stock, and on such terms as they may deem for the best interest of the township."

Does anybody think that this act can receive the inequitable interpretation that the Legislature intended that townships might own and sell stock, and have any benefit of it, and yet set up, that the bonds issued to pay for the same are invalid, and the collection of the same cannot be enforced ?

JAMES GRANT.